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Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

GEORGE B. CHRISTENSEN
Suite 5000
One First National Plaza
Chicago, Illinois 60603

JOSEPH S. FONTANA
JOHN R. KEYS, JR.
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Counsel for Amicus Curiae

Of Counsel:

WINSTON & STRAWN
Suite 1040
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Suite 5000
One First National Plaza
Chicago, Illinois 60603

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CONSENT TO FILING OF BRIEF AMICUS CURIAE

Petitioners and Respondents consented in writing to the filing of this brief. Letters of consent have been filed with the Clerk.

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA) is a voluntary, non-profit organization of the chief elected or appointed officers of reservation Indian tribes or federally recognized tribes with federal trust lands or with members who live on or near federal reservations having a local governing entity. Approximately 190 federally recognized tribes having populations representing around 90 percent of the estimated 800,000 American Indians are represented in NTCA.

NTCA was founded as the official voice of Indian tribal leadership to insure preservation of the trust relationship between the United States Government and reservation Indians, to protect reservation human and natural resources, and to promote Indian self-determination. It has always been committed to the principle of inherent Indian tribal sovereignty, limited only by treaty or specific legislation.

As shown at p. 35, *infra,* there are 71 tribal courts created in much the same manner as the Suquamish court. There are 56 other Indian courts operating under differing authorities. The ability of all of these courts to discipline non-Indian miscreants within reservations would be jeopardized if Petitioners' position was sustained. It is obvious that with free passage of citizens into, on and through reservations, not all law offenders are, or will be, Indians.

NTCA believes preservation of jurisdiction in tribal courts to preserve an orderly society within reservation boundaries is essential for the type of society In-

dians and Congress alike are trying to evolve and maintain.

Petitioners and their supporting *amici* would have this Court believe that the jurisdiction against which they rail should depend largely upon the relative populations of the Indian and non-Indian communities of the Port Madison Reservation and the size of the non-Indian fee land base there. Brief for Petitioners at 8-9; Brief for Attorney General, State of Washington at 2-3; Brief for Kitsap County at 2. Petitioners further assert that the Suquamish have not had a tribal community for some time. Brief for Petitioners at 9. On the other hand, South Dakota points to large reservation areas within that state, the significant non-Indian population living within the boundaries of those reservations, and some 95 "attempts" by tribes in that State to enforce their laws through their tribal courts against non-Indians. Brief for South Dakota at 2.

However, in any such weighing of particulars it becomes obvious, that Port Madison and the Suquamish in many ways are not typical of "Indian country."[1] Those opposed to the Suquamish would give no consideration to the vast reservations of the Southwest, many of which are wholly owned by the tribes and have overwhelming Indian majorities. Between the situation at Navajo, for example (13,989,222 acres,

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[1] We invoke the concept of a typical tribe or reservation advisedly. There are tribes smaller than Suquamish which have courts, but they most often possess reservations with much lower percentages of allotted or non-Indian land or a lower ratio of non-Indian population, *e.g.* Kaibab, Picuris Pueblo. See Appendix A to this Brief. Other tribes have high ratios of allotted land, but with a lower percentage of non-Indians. *Id.* It should not be concluded, however, that Suquamish is unusually small or that it is atypical in consisting largely of allotted land.

92.5 percent tribally owned; total population of nearly 133,000, only 5.5 percent non-Indian) and that of the Suquamish there is a broad range of tribal circumstance that must be considered, if the Court is disposed to consider the "policy" arguments espoused by South Dakota *et al.*, because the Court's decision will, if in favor of Petitioners, have dire impact on all tribes, heaviest on those most in need of routine law enforcement. (See App. A to this Brief.) A just resolution of the matter requires a considerably more complete analysis of fact than is afforded by the record in the *Oliphant* and *Belgarde* cases. And Kitsap County admits as much. Br. Brief for Kitsap County at 2a.

Petitioners and Kitsap County further argue that the Suquamish do not have much of a court. Brief for Petitioners at 17-18; Brief for Kitsap County at 18-20. The volume of business of the Suquamish court may indeed be low and it does not possess elaborate facilities or the familiar externals of modern courts.

But, there is much more to consider:

At the other end of the scale, for example, is the rather sophisticated Navajo court system which handled 29,843 cases in 1972.[3] Along the varying spectrum exist a large number of courts which play vital roles in the preservation of order and Indian self-government.

Petitioners and their *amici* construct their notions of "common sense" by emphasizing those facts which render the Suquamish court quite atypical of the great majority of reservations and tribal courts.[4] Yet they

[3] *See* Fahey, *Native American Justice: The Court of the Navajo Nation*, 59 JUDICATURE 10 (1975).

[4] See note 1, *supra*. We do not suggest that the Suquamish court is atypical of tribal courts other than as specifically noted herein, nor do we question the tribal court's ability to dispense due process of law. The District Court in fact specifically found compliance with the Indian Civil Rights Act in *Oliphant*. Mem. Op. (W.D. Wash. Apr. 5, 1974); J. App. 51-52.

urge a ruling of broad general application to all tribes based on the Suquamish situation. The impropriety is plain.[4] This brief is directed to clarification of the factual basis upon which such an important issue should be decided and which has been obscured by Petitioners and their record-supplementing *amici*.

The larding of the Kitsap brief by reference to petitions, newspapers articles, County Board of Education estimates, letters from community clubs, and the like (pp. 2, 4, 5, 7, 8) tends to support the conclusion of the Kitsap County Commissioners that there is a "rather tense situation" in that Washington County. Brief at 1a. (We suggest it may arise from the well known fisheries differences.) The brief of South Dakota and associated *amici* contains overtones that officials of several states fear non-Indian defendants facing a judge of another race even though that judge is a United States citizen.

The exaggerated claims of South Dakota are perhaps exposed by the statement (first printed page) that "the following *States* by their respective Attorneys General join in the views expressed" in the South Dakota brief (emphasis added). Since when Attorneys

[4] The Solicitor General could not, when he advised the Court that the opinion of the Ninth Circuit presented a question worthy of certiorari, have expected that various public officials would appear and convert the case into an *ad hominem* attack upon the Suquamish tribe and court and seek to raise "policy" questions better addressed to Congress.

General became endowed with the authority to speak for an entire state on what the brief claims to be unprecedented question we do not know. Witness the opposed positions in this case of the Attorney General and the Governor of Washington. The political, rather than judicial nature of the South Dakota drive is confirmed by the last paragraph of its Summary of Argument which refers to the "*policy* questions involved in this case," dilates on what it believes "*federal Indian policy*" to be and offers what it thinks a "*viable policy*" would be (emphasis ours). Brief for South Dakota at 6-7. This would leave little for Congress.

Thus, NTCA is justified in regarding the entire Indian tribal court system as under attack and in rising to its defense. One, and perhaps a sufficient, answer to these state and county officials is that the tribal courts, however formal or informal they may be, must have been dispensing substantial justice regardless of race, else South Dakota and its associated *amici* would point to numerous non-Indian defendants who have been released by federal writs of habeas corpus under the Indian Civil Rights Act after unfair convictions.[5] Here the writ was sought by "tense" defendants *before* trial.

Jealousy, or racial inhospitality by local non-Indian elected officials may explain why South Dakota and its friends would do away with tribal court jurisdiction over all persons accused of misdemeanors within reservations. However, it does not excuse a failure to show that non-Indians are being treated unfairly by tribal

[5] Note the informal statistics submitted herewith showing the appreciable number of non-Indian defendants who have been before tribal courts, pp. 40-42, *infra*.

courts or that such courts interfere with state law enforcement.

Indian tribes possess, within congressional limits, the powers of other governing entities, including police powers, and territorial jurisdiction over their reservations and all persons within them. Congress has guaranteed these powers to the tribes. Only Congress rightfully can restrict them, South Dakota's Attorney General to the contrary notwithstanding. The Court of Appeals correctly upheld tribal exercise of legitimate powers.

However, Petitioners appear to assert that tribes possess no powers not expressly conferred upon them by Congress or, at least, that Congress has terminated the powers at issue. Reduced to essence their theory seems to be that the Suquamish have ceased to exist as a real tribe, that Port Madison has suffered a *de facto* diminishment of its reservation status, and that the non-Indian, having achieved numerical majority, must be the paramount political entity on the reservation. This approach is not supported in the law or the operative theory of Indian relations, and in any event would be limited to Suquamish facts.

Petitioners' various contentions, if accepted in any significant part, would restrict severely the ability of tribes to legislate generally for their reservations to assure public order and safety, and to protect reservation resources.

The dissent below and *amicus* South Dakota focus upon the dearth of decisions and create a supposed "common understanding" (in a muddled situation) precluding tribal jurisdiction over non-Indians. The sense of puzzlement tincturing those legally unsup-

ported views will be relieved by a more thorough look at the history of Indian and federal sovereignties which, we will show, has been marked variously by practical cooperation, harrassment, and recently, by mutual respect—a course this Association strives to maintain.

We hope the information gathered herein, although *dehors* the record, will assist the Court in arriving at an understanding of how tribal courts function and the problems they and the tribes face. Our information is neither perfect nor complete but indicates that tribes possess the capacity of administering justice fairly and responsibly without regard of race.*

SUMMARY OF ARGUMENT

Long before European settlement of North America, Indian tribes were independent, self-governing nations. They survive today, retaining those sovereign powers that have not been abrogated by treaty or acts of Congress, even though for a time those powers were to a degree lost sight of, or rendered difficult of exercise, by military might. This legal retention of sovereignty, includes the power to enact criminal laws and to apply them to all persons within the territorial jurisdiction of the tribes. No treaty or statute has ever divested the Suquamish Tribe or its court of this attribute of sovereignty. The Tribe's exercise of that sovereignty over Petitioners for violation of tribal law, on tribal trust lands in the case of Oliphant, and within the reservation in the case of Belgarde, are valid.

* The undersigned, as counsel for NTCA, circulated questionnaires, App. B, from which the table at p. 42 was built. We believe the returns to be honest but they are incomplete. We do not have resources to go further.

It is clear also that the tribal court's action has been authorized by Congress. The tribe is organized under a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1970), and approved by the Secretary of the Interior. The court was established and its jurisdiction in the present case exercised under authority of valid tribal legislation.

An historical review of Indian self-government, in particular of their judicial systems, confirms the view that modern tribal courts indeed are exercising the original sovereign powers of the tribes; further, that tribal authority over non-Indians within reservations or trust lands, generally held quiescent for many years by military, political and economic realities, nevertheless, survives. Indian tribes today are asserting jurisdiction over non-Indians to a limited extent calculated to meet the necessities of reservation life and government. Such exercise of authority, though not extensive, is important to the preservation of reservation peace and security, the protection of natural resources, and tribal dignity. And its exercise constitutes no radical departure from any "common understanding" that can be supported on the factual record.

It is clear that tribal assertion of this limited jurisdiction furthers the established congressional policy of securing Indian self-determination through the development of capable tribal governments. From the tribal perspective, the principle consistently followed by this Court that Indians have the right to make their own laws should be sustained and construed to include the ability of Indian society to protect itself against the depredations of either Indian or non-Indian.

It should not be forgotten that tribal courts are not courts of last resort. Due process is guaranteed by the Indian Civil Rights Act to all who come before these tribunals. Federal habeas corpus is available to any who might be treated unfairly.

We therefore urge that the Court affirm the decisions of the lower courts.

At the same time we recognize, from the presentations of other participants in this case and our own efforts, that both sides have deemed it necessary to supplement the record considerably. Accordingly, we recognize that, should the Court desire to depart from the cold legal history of this country's relations with the original sovereigns of this land and consider the social significance of tribal courts to this nation, it may feel it appropriate that certiorari be vacated and the writ be dismissed as improvidently granted because of an inadequate record.

ARGUMENT

I. THE SUQUAMISH TRIBE PROPERLY EXERCISED JURISDICTION OVER PETITIONER BY AUTHORITY OF TRIBAL AND FEDERAL LAW.

The Court should affirm the result and reasoning of the Court of Appeals in *Oliphant* v. *Schlie,* 544 F.2d 1007 (1976). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory.*" *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832); *United States* v. *Antelope,* —— U.S. ——, 97 S.Ct. 1395, 1398 (1977); *United States* v. *Mazurie,* 419 U.S. 544, 557 (1975) (emphasis added).

One of the original attributes of sovereignty of the Suquamish and all tribes was the power to apply its law to all persons within its territory. This Court's statement in *Williams* v. *Lee,* 358 U.S. 217, 220 (1959), that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive" is consistent with the basic proposition. The Ninth Circuit's analysis in the present case that original or inherent tribal powers are preserved under federal law unless expressly divested by the tribe or extinguished by Congress reflects the historically, legally correct view.[7] *See* 544 F.2d at 1009-10. There exists no statutory or treaty obstacle to tribal jurisdiction in the present case. Therefore it follows that the Suquamish Tribe possesses jurisdiction to try Oliphant and Belgarde, non-Indians, for their alleged violations of tribal law occurring on tribal trust land in the former case and on both trust and fee lands within the reservation in the latter.[8]

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[7] Various federal courts have relied upon this basic proposition. *See Tom* v. *Sutton,* 533 F.2d 1101 (9th Cir. 1976); *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976); *Ortiz-Barraza* v. *United States,* 512 F.2d 1176 (9th Cir. 1975); *Wounded Head* v. *Tribal Council of Oglala Sioux Tribe,* 507 F.2d 1079 (8th Cir. 1975); *Stone* v. *United States,* 506 F.2d 561 (8th Cir. 1975); *Kills Crow* v. *United States,* 451 F.2d 323 (8th Cir. 1971); *Groundhog* v. *Keeler,* 442 F.2d 674 (10th Cir. 1971); *Davis* v. *Littell,* 398 F.2d 83 (9th Cir. 1968); *Colliflower* v. *Garland,* 342 F.2d 369 (9th Cir. 1965); *Oliver* v. *Udall,* 306 F.2d 819 (D.C. Cir. 1962); *Native American Church of North America* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Barta* v. *Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

[8] The primary distinction between the two cases lies in the fact that while Oliphant was charged with an offense occurring on tribal trust lands, Belgarde's actions occurred at least partially, on a state highway within the reservation. J. App. 114. The Court of Appeals

It is unnecessary to restate Respondents' arguments. Counsel for the Tribe have ably presented its case. We endorse their analysis and conclusions. We would, however, like to explain and distinguish the one federal *nisi prius* case touted by Petitioners as a bar to tribal jurisdiction:

In *Ex parte Kenyon,* 14 Fed. Cas. 353 (No. 7720) (C.C.W.D. Ark. 1878), Judge Parker issued the dictum upon which Petitioners and opposing *amici* base their "common understanding" that Indian tribes cannot enforce their laws against non-Indians. Kenyon, a non-Indian U.S. citizen married to a Cherokee woman, resided in the Cherokee Nation for a number of years. Upon the death of his wife he moved to Kansas taking with him a horse of which he was in rightful legal possession but which had been owned by his deceased wife. *Id.* at 354-55. He sold the horse in Kansas, an act regarded by the Cherokee Nation as an unlawful conversion of his wife's property. Kenyon was convicted of larceny by the tribal courts and sentenced to five years imprisonment. He petitioned in federal court for a writ of habeas corpus challenging the jurisdiction of the Cherokee court.

The federal court's decision that the tribal court lacked subject matter jurisdiction because the offense had occurred outside Cherokee territory was dispositive and was so acknowledged by Judge Parker. *Id.* at 355. *See Elk* v. *Wilkins,* 112 U.S. 94, 108 (1884). The

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has not had an opportunity to rule upon whether this distinction bears upon the outcome of the *Belgarde* case. We submit that the result would be the same, however, since it is established that rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of tribal authorities. *Ortiz-Barraza* v. *United States,* 512 F.2d 1176 (9th Cir. 1975).

court proceeded to find also that the Cherokees lacked personal jurisdiction over Kenyon, primarily because he was no longer a domiciliary of their nation. *Id.* That would have been enough. But the court began its analysis of personal jurisdiction by asserting that "to give [the Cherokee] court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian." *Id.* Without discussion, the court cited Section 2146 of the U.S. Revised Statutes (1873), a statute nearly identical to the present 18 U.S.C. § 1152.*

That statute did not contain the language recited in Judge Parker's opinion. In fact Congress studiously avoided describing the United States' general criminal jurisdiction in Indian country as being exclusive. Judge Parker did not fathom the possibility that Congress might have intended simply to extend federal jurisdiction to the Indian country, where it had not previously existed, as a protective, peace-making device while preserving concurrent tribal jurisdiction and assuring exclusive tribal jurisdiction over offenses committed by Indians against Indians. This, we sub-

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* The section now reads:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

mit, is the more reasonable interpretation. Tribal and federal jurisdiction in fact clearly were concurrent for offenses by Indians against non-Indians with a tribal right of preemption expressly stated.

While application of the General Crimes Act was expressly made subject to treaty rights, Judge Parker did not consider the provisions of any treaty between the United States and the Cherokee which might have determined the question. For example, the Treaty of New Echota, 7 Stat. 478 (1835), secured to the Cherokees the right to make and enforce all laws deemed necessary for the "protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them." Art. 5, 7 Stat. 481. Arguably, this provision provided a basis for jurisdiction over the person of Kenyon. Yet it was not considered by the court even though apparently still in effect. *See Talton* v. *Mayes*, 163 U.S. 376, 380 (1896).[10]

[10] Judge Parker's inquiry into Cherokee jurisdiction was flawed from the start. It was premised upon his statement that if Kenyon was held by action of the Cherokee Nation without its having jurisdiction then he was held in violation of the Constitution, laws, and treaties of the United States. *Ex parte Kenyon, supra,* at 354. This Court subsequently held, however, that the Constitution could have no application to the actions of Indian tribal governments. *Talton* v. *Mayes*, 163 U.S. 376 (1896). Accordingly, it was incumbent upon Judge Parker to afford more attention to the applicable treaties and to Rev. Stat. § 2146. Moreover, if it was not clear in 1878, it is now that special criminal statutes relating to Indian country and the division of federal, tribal, and state jurisdiction are not based on the race of the offender but on the quasi-sovereign status of tribes over their reservations. *United States* v. *Antelope*, —— U.S. ——, 97 S. Ct. 1395, 1398-1400 (1977); *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976). Nor is jurisdiction over non-Indians precluded on grounds that non-Indians cannot participate in tribal government. *United States* v. *Mazurie*, 419 U.S. 544 (1975).

While any proper analysis of the present case must be premised upon recognition of the inherent sovereignty of the tribe, we also find firm support for Suquamish jurisdiction in this case in affirmative acts of Congress and the Executive Branch.

The Suquamish Indian Tribe is a federally-recognized tribe organized under the Indian Reorganization Act, 25 U.S.C. § 476 (1970), and governed by a constitution and by-laws approved on July 2, 1965, by the Undersecretary of the Interior. Mem. Op. (W.D. Wash., Apr. 5, 1974), J. App. at 49; Respondents' Brief for Opposition to Certiorari, p. 5. In 1973, in accord with its constitution, the Tribe, by referendum, adopted a law and order code and established its tribal court and police system pursuant to that legislation. Under the tribal constitution the code was not required to be approved by the Secretary, but it is regarded by the Department of the Interior as valid legislation. Brief for the United States at 4-5. Petitioner was charged with violation of this Code and was subjected to the jurisdiction of the tribal court. These facts plainly indicate firm congressional and executive authority for the jurisdiction in question.

This Court held recently in *United States* v. *Mazurie*, 419 U.S. 544 (1975), that tribal law could be applied to non-Indians for criminal violations. There the Court upheld the conviction of two non-Indians for unlawfully introducing liquor into Indian country. The statutes violated, although federal in origin, 18 U.S.C. § 1154 (1970), delegated federal regulatory authority to the tribes. *Id.* § 1161. The Wind River Tribes, pursuant to that delegation, enacted an ordinance requiring retail liquor outlets within the reservation to ob-

tain a tribal license. 419 U.S. at 548. After a tribal hearing, defendants failed to obtain the required license but chose to operate their establishment in contravention of tribal law. Prosecution of the offense was federal, but the law violated was tribal. Defendants contended, and the Court of Appeals stated, that it failed "to see how such an association of citizens (the Tribe) could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization." *United States* v. *Mazurie,* 487 F.2d 14, 19 (10th Cir. 1973). Rejecting such arguments this Court held:

> . . . [W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority . . . .

419 U.S. at 557. Congress, through the Indian Reorganization Act, and the Secretary of the Interior, by reason of his general power to disapprove tribal legislation have, in effect, delegated to the Suquamish Tribe the power to enact and enforce its criminal code over all persons within the reservation.

II. INDIAN TRIBAL COURTS HAVE EVOLVED IN ACCORD WITH FEDERAL LAW AND POLICY AS IMPORTANT INSTRUMENTS OF TRIBAL SELF-GOVERNMENT. THEIR HISTORY REFLECTS NO GENERAL ABROGATION OF CRIMINAL JURISDICTION OVER NON-INDIANS.

Tribal courts have evolved as vital manifestations of the retained powers of self-government of federally-recognized Indian tribes. Such governmental powers as the tribes originally possessed within their territory were never ceded by the tribes or withdrawn by superior authority despite a long history of military, political and economic subjugation of the tribes.

South Dakota asserts that the 100-year dormancy of the question of tribal jurisdiction over non-Indians contributed to a "common understanding" that such exercise had been condemned. Brief for South Dakota at 3. While dormancy generally is unquestioned, history shows that the issue was regarded not as foreclosed, but as unclear. History in the last 200 years has not been particularly kind or consistent for the Indian people, and it would indeed be tragically mistaken if modern authority were to find that basic rights once held have been abrogated through the sheer force of their suppression.

The colonial period in America was marked by persistent warfare between the tribes and the various European powers. Violations of Indian customary law by non-Indians, if grievous enough, commonly resulted in military forms of retaliation rather than judicial sanction. *See* REID, A LAW OF BLOOD (1970). As the balance of power shifted toward the colonies, however, the eastern tribes were forced either to move beyond the frontier or seek a workable peace. Coexistence required that mechanisms other than war be found to

prevent and punish non-Indian offenses against the tribal peace, and the tribes typically were content to let the British punish their own and to receive economic compensation for wrongs against the tribe. *Id.* at 126; REID, A BETTER KIND OF HATCHET 176-77 (1976). To construe such political, pragmatic efforts at peace as a conscious surrender of jurisdiction in the sense of Anglo-Saxon common law would, of course, strain the contemporary concepts prevailing on both sides."[11] There is evidence for example, that the British, for their part, disdained exercise of jurisdiction over their own subjects in Cherokee territory where the Tribe had made clear it would not stand for the intrusion and consequent threat to the harmony of their Nation. Letter from Ludovic Grant to Gov. James Glen, May 3, 1752, 2 INDIAN BOOKS 261-62.

A. The Treaty Period

Many of the earliest treaties of the United States with Indian tribes clearly preserved the judicial authority of the signatory tribe, in whole or in part, as against both state and federal governments. The Delaware Treaty of 1778, 7 Stat. 13, provided that "for the better security of the peace and friendship" between the parties, neither the United States nor the Delawares "shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender . . . , till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting

[11] Indeed, the Northwest Ordinance, 1 Stat. 50, 52 (1789), indicated that the fledgling Congress would make laws regarding Indians for the purpose of "preventing wrongs being done to them, and for preserving peace and friendship with them."

parties, and natural justice . . . . *Id.* art. 4; *see Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 550 (1832). The jurisdiction of the parties to this first treaty was, in effect, concurrent. Subsequent treaties, however, recognized exclusive tribal jurisdiction over most crimes. The Treaty of 1785 with the Cherokees, 7 Stat. 18, provided in Article V that any citizen of the United States settling in the lands reserved by the treaty to the tribe "shall forfeit the protection of the United States, and the Indians may punish him as they please." *Id.* at 19. *See also* Treaty of 1785 with the Wiandot, 7 Stat. 16, art. V. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146, n. 212 and treaties cited therein, 364 (U.N. Mex. 1971) [hereinafter cited as COHEN]. Such provisions for tribal punishment of non-Indians for offenses committed in the Indian country followed the practice of international treaty making. COHEN 364.

Both the Cherokee and Wiandot treaties, however, also contained a measure of federal assumption of juridical authority. The tribes agreed to "deliver up" to the United States for punishment any Indian or other person residing among them committing any capital crime upon a U.S. citizen.[12] Art. VI, 7 Stat. 19; Art. IX, 7 Stat. 17. In construing this Cherokee treaty and, in particular, the Tribe's general acknowledgment of the protection of the United States, Justice Marshall relied upon the British practice in treaty-making and the Indians' understanding of it. "The strong hand [of the European powers] was interposed

[12] Secretary of War Henry Knox recommended this relationship to President Washington in 1789. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 145 (Comm. print 1977) [hereinafter cited as AIPRC, FINAL REPORT].

to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832). "The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them." *Id.* There was no surrender of national character involved. *Id.*

Later treaties commonly provided for the delivery of white offenders to federal authorities, *e.g.*, Treaty of 1789 with the Six Nations, 7 Stat. 33, 35, and the original Trade and Intercourse Act of 1790, 1 Stat. 137-38, as well as its subsequent enactments, provided for federal jurisdiction over non-Indians charged with crimes against Indians in Indian country. *See* COHEN 364. Such provisions of law reflected the federal government's policy of imposing itself as a buffer between the tribes and the "unprincipled white men" who were perceived as posing the greatest threat to the tribes and to the peace of the frontier. *See* TASK FORCE FOUR, AMERICAN INDIAN POLICY REVIEW COMM'N, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 90 (1976).

This Court spoke definitively with respect to federal Indian relations in 1832 in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515. There the Court stated:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power. . . .

Id. at 559. The Cherokees, the Court held, had never through their treaties surrendered their right to self-government. *Id.* at 561. The Cherokee Nation occupied its own territory in which the criminal laws of the State of Georgia could have no force. *Id.*

Congress, in 1834, evidenced this same view. The congressional report accompanying the legislation later known as the General Crimes Act, see note 9, *supra*, stated:

> It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian Law *in the early stages of their government.*

H. R. REP. No. 474, 23d Cong., 1st Sess. 13 (1834) (emphasis added). Tribal criminal jurisdiction, to the extent it had not been expressly relinquished or subjugated to other authority, was viewed by Congress and the Supreme Court as paramount. Federal jurisdiction was supplementary. Thus, the General Crimes Act extended the criminal laws of the federal government to Indian country with the express exception of crimes committed by one Indian against the person or property of another Indian.[13] There was

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[13] Section 25 of the Trade and Intercourse Act of 1834, 4 Stat. 729, 733 read as follows:

> *And be it further enacted;* That so much of the laws of the United States as provides for the punishment of crimes com-

no express or implied intent to make such federal jurisdiction exclusive or to withdraw concurrent jurisdiction from the tribes.

B. The Reservation Period.

Traditional systems of tribal justice survived well into the 19th Century. Judicial authority in tribal society typically was vested in communal councils composed of the chiefs or elders and was founded upon principles of community consensus and theology. *See* AIPRC, FINAL REPORT, *supra* note 12, at 161-62. Some tribes, such as the Cherokees, others of the Five Civilized Tribes, and the Senecas adopted European styled institutions, including courts, at relatively early dates. *Id.* at 162; Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 970 (1972). But the Nineteenth Century, including the relentless westward removal of tribes, persistent warfare, and confinement to reservations witnessed the near-decimation of tribal society, and, consequently, many of the traditional forms of Indian self-government. AIPRC, FINAL REPORT, 161-62.

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mitted within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Later, the language was added specifying that:

> The preceding section shall not be construed to extend to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case where by treaty stipulations, the exclusive jurisdiction over such offense, is or may be secured to the Indian tribes respectively.

10 Stat. 270 (1854).

An 1855 opinion of the Attorney General is particularly interesting at this juncture. 7 Op. Att'y Gen. 174 (1855). Where a non-Indian had married into and resided in the Choctaw Nation he was held to be subject to the civil, but not the criminal, jurisdiction of the tribal courts. Criminal jurisdiction did not exist because the treaty of Dancing Rabbit Creek had precluded it even though the question had been negotiated. *Id.* at 179. The Attorney General, however, stated very clearly:

> . . . [I]t is certain that the Agent errs in assuming the legal impossibility of a citizen of the United States becoming subject, in civil matters, or criminal either, to the jurisdiction of the Choctaws.

Id. at 177. Tribal civil jurisdiction existed because Congress had never taken it away. *Id.* at 180.

The federal policy in mid-century was directed toward civilizing and assimilating the Indian, and imposition of western law on the reservation was seen as a primary agent of this process. A prominent cleric advised President Lincoln "[The Indian] cannot live without law. We have broken up, in part, their tribal relationships, and they must have something in their place." *See* AIPRC, FINAL REPORT 162. In 1877, the Commissioner of Indian Affairs concurred in this sentiment, reporting:

> Civilization has loosened, in some places broken, the bonds which regulate and hold together Indian society in its wild state and has failed to give people law and officers of justice in their place.

BUREAU OF INDIAN AFFAIRS, ANNUAL REPORT 2 (1877).

As a result of the need for law and order on the reservation and as a manifestation of a continuing struggle for reservation control between civilian and military authorities, federal Indian agents began to create their own Indian police forces responsible directly to the agents. *See generally* BUREAU OF INDIAN AFFAIRS, INDIAN LAW ENFORCEMENT HISTORY (1975). In some cases courts were established, often with the Agent sitting as judge. *Id.* at 23. The federal motive was not necessarily to foster tribal self-government. In 1881, Commissioner of Indian Affairs Price reported that his new police and court system "weakens and will finally destroy, the power of tribes and bands." *See* AIPRC, FINAL REPORT 162. Nevertheless, the tribal right of self-government was not extinguished by Congress.

In 1883, the Commissioner first promulgated rules to govern the newly-founded Courts of Indian Offenses. BUREAU OF INDIAN AFFAIRS, LAW ENFORCEMENT HISTORY 23 (1975). The rules were directed against such practices as sun dancing and polygamy, and the Indian agents were directed to appoint leading tribesmen to sit in judgment of these and other crimes. *Id.; see Colliflower* v. *Garland,* 342 F.2d 369, 372 (9th Cir. 1965). Congress that same year, by statute, charged the Commissioner, under the direction of the Secretary of the Interior, with the "management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2 (1970); *see Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89, 95 (8th Cir. 1956). This general grant of authority subsequently was held to authorize the Commissioner to establish rules of government for the reservation, including the creation of Indian police and Courts of

Indian Offenses. *United States* v. *Clapox,* 35 F. 575 (D. Or. 1888). These courts were regarded at the time as institutions for the discipline and education of the Indian into the "habit and knowledge of self-government." *Id.* at 577, 579.

The Indian Department Appropriations Act of 1888, 25 Stat. 217, 233, carried the first congressional provision for funding of the Indian courts, and Congress has made such appropriations for reservation law and order continuously since that time. *See Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89, 95 (8th Cir. 1956). Specifically, the Bureau of Indian Affairs Authorization Act in 1921 provided that the BIA shall "direct, supervise, and expend such moneys as Congress might appropriate, for [*inter alia*], the employment of . . . Indian police [and] Indian judges," 25 U.S.C. § 13 (1970), and substantial federal expenditures are made today under that authority.[14]

The continuing, undiminished sovereignty of the tribes in criminal matters involving their own citizens was affirmed by this Court in 1883 in *Ex parte Crow Dog,* 109 U.S. 556. Crow Dog was tried, convicted, and sentenced to death in federal court for the murder of Spotted Tail, a fellow tribesman, in Indian country. Crow Dog challenged the jurisdiction of the federal court and the case reached the Supreme Court. There Mr. Justice Mathews stated that the treaties with the Sioux Tribes had pledged to secure to the Indian an "orderly government." 109 U.S. at 568. The very purpose of all of these arrangements was to introduce and naturalize among them self-government, "the regulation by themselves of their own

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[14] See p. 47, *infra*.

domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." *Id.* Congress had never assumed jurisdiction over the crime of murder by one Indian of another, and Crow Dog thus was not subject to the jurisdiction of the federal court. He was released to be dealt with according to tribal law which required only economic support of the victim's family.

The public clamor arising over the *Crow Dog* case resulted in the passage in 1885 of the Federal Major Crimes Act. 23 Stat. 362, 385. By this Act, now codified at 18 U.S.C. § 1153 (1970), the United States purportedly assumed exclusive jurisdiction over specified major offenses committed by Indians against the person or property of other Indians.[15] The Crow Dog affair indicated the necessity for clear congressional action where original tribal powers were to be modified.

By 1890 courts of Indian offenses existed at two-thirds of the agencies, but federal authorities regarded the jurisdictional status of these courts as unclear. AIPRC, FINAL REPORT 162-63. As discussed above, in 1878 Judge Parker erroneously had interpreted the General Crimes Act to bar the courts of the Cherokee Nation from exercising criminal jurisdiction over a non-Indian. *Ex parte Kenyon,* 14 F. Cas. 353 (No. 7720) (C.C. W.D. Ark.). Non-Indians, nevertheless, posed some of the principal problems faced by Indian courts and police. AIPRC, FINAL REPORT 163. Indian court jurisdiction over whites, mixed-

[15] Those crimes now include murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny. 18 U.S.C. § 1153 (1970).

blood Indians, and allottees was challenged periodically, but the Department of the Interior consistently chose to avoid such test cases. AIPRC, FINAL REPORT 163; HAGAN, INDIAN POLICE AND JUDGES 145-46 (1966).

C. Revitalizing Tribal Governments.

For many years tribal governments foundered under federal assimilation policies directed to the disintegration of the tribal land base and the teaching of western acculturation.[16] In 1934, Congress abruptly broke with this policy and passed the Indian Reorganization Act (IRA). 25 U.S.C. §§ 461-79 (1970). The IRA was aimed primarily at halting erosion of the Indian land base and revitalizing tribal governments. *Fisher* v. *District Court,* 424 U.S. 382 (1976); *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 151 (1973); *see* AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS 22 (1977) [hereinafter cited as SURVEY OF TRIBAL COURTS]. Under Section 16 of the IRA, 25 U.S.C. § 476 (1970), Indian tribes were authorized and encouraged to adopt new constitutions and by-laws incorporating the powers vested in tribes under existing laws plus other powers enumerated in the Act. *Id.*

The creation or restoration of tribal courts under the IRA to replace the departmental Courts of Indian Offenses ("CFR courts") was contemplated from the beginning. The Solicitor of the Department of the

[16] The General Allotment Act, 24 Stat. 388 (1887), was designed to civilize Indian people by granting individual interests in land to Indians in order to promote adoption of an agrarian lifestyle. The Act resulted in the loss to tribes of some 90,000,000 acres. *See Note, Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955, 959-60 (1972).

Interior rendered a lengthy opinion in 1934 stating that the powers of an Indian tribe to administer justice on the reservation derived from the tribe's sovereign powers of self-government. 55 I.D. 14, 56 (1934). In all fields in which the tribe could legislate it necessarily possessed coextensive power "to adjudicate through tribunals established by itself." *Id.*

The Solicitor further recognized that the original criminal jurisdiction of the tribes had never been transferred to the States. *Id.* at 57. Under existing law, the States had jurisdiction over some acts of non-Indians on the reservation (citing *United States* v. *McBratney,* 104 U.S. 621 (1881), *id.* at 58; but that did not include crimes involving either an Indian offender or victim. *Id.* at 60-61. Tribal authority over "minor" crimes of Indian against Indian was plenary, and the Solicitor regarded federal jurisdiction over the statutory major crimes as exclusive. The Solicitor, however, regarded as "not clear" the question of whether offenses such as disorderly conduct or simple assault, when committed by a non-Indian against an Indian in Indian country, could be prosecuted in federal court. *Id.*

In 1934, most tribes had little or no experience with constitutional government, and they naturally looked to the BIA for assistance in reforming their governments. See SURVEY OF TRIBAL COURTS, *supra* p. 27 at 23; Note, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955, 968-69 (1972). The BIA responded by proffering standard constitutions which became the basis of most tribal governments and which generally authorized the tribal council to create tribal courts and to enact law and order codes. *Id.* at 24-25. All IRA constitutions and

amendments thereto must be approved by the Secretary of the Interior. 25 U.S.C. § 476 (1970).

The Department of the Interior promulgated amended regulations for the Courts of Indian Offenses in 1935 which provided that the rules applicable to its "CFR courts" should apply "until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective." *See* 25 C.F.R. § 11.1(d).

The CFR courts represented the only familiar judicial model for most tribes so that even those tribes electing to create their own courts under the IRA adopted the existing federal regulations, sometimes verbatim, as the basis of their law and order codes. SURVEY OF TRIBAL COURTS 25-27. The pervasive influence of the Department of the Interior and the 1934 Solicitor's Opinion thus had a marked impact upon the development of tribal constitutions and judicial systems. The 1935 regulations restricted the jurisdiction of the CFR courts to offenses committed by Indians within the reservation. 25 C.F.R. § 11.2(a) (1976). Where federal or state law applied, the jurisdiction was concurrent. *Id.* § 11.2(b). Following this federal model, most tribes chose the same pattern, adopting constitutions and enacting legal codes which limited tribal criminal jurisdiction to Indians."[17] SURVEY OF TRIBAL COURTS 28. Thus the uncertainty that had beset the Interior Department, much of it stemming from the *Kenyon* dicta, determined the tribes' jurisdictional perspective.

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[17] Civil authority over non-Indians extended to plaintiffs and to consenting defendants. SURVEY OF TRIBAL COURTS 28.

Tribal courts underwent little real development after the initial formative period owing chiefly to the more pressing demands of land and economic issues and the return of Congress to policies favoring termination and assimilation. *Id.* at 30-32. In 1953, over strong but unheeded tribal opposition, Congress passed Public Law 280,[18] conferring upon five specified states [19] all criminal and civil jurisdiction over reservation Indians. Other states were given the option of assuming such jurisdiction by their unilateral action, and several states chose to do so at least in part. This process of jurisdiction transfer was effectively halted in 1968 when Congress provided that from that time forward the consent of the affected tribe to state assumption of jurisdiction would be required. 25 U.S.C. §§ 1321-22 (1970).[20]

That same year signalled renewed congressional focus upon tribal justice systems. After some seven years of study and hearings by Senator Ervin's Senate Subcommittee on Constitutional Rights, Congress passed the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* (1970), which applied certain guarantees of individual rights styled after the federal Constitution to Indian tribes "exercising powers of self-government." *Id.* § 1302. The Act expressly recognized that tribal powers of self-government included judicial, as well as legislative and executive powers, and that the

[18] 67 Stat. 588-90, now codified as 18 U.S.C. § 1162 (1970), 28 U.S.C. § 1360 (1970); *see* 25 U.S.C. §§ 1321-22 (1970).

[19] California, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconsin (except Menominee). Alaska was added to this category in 1958. Pub. L. 85-615.

[20] Additionally, the law provided for federal acceptance of state retrocession of all Pub.L. 280 jurisdiction. 25 U.S.C. § 1323 (1970).

judicial power was exercised through both tribal courts and courts of Indian offenses. 25 U.S.C. § 1301(2), (3) (1970). The constitutionally patterned rights, moreover, were guaranteed to "*any person,*" not just to Indians. The implication is clear that Congress contemplated the appearance of non-Indians before tribal tribunals.

The federal view of tribal criminal jurisdiction wavered in the early 1970's. In 1970 the Interior Department Solicitor issued Opinion No. M-36810 in which he concluded that Indian tribes generally do not possess criminal jurisdiction over non-Indians unless such authority is expressly retained under a surviving treaty provision as provided in 18 U.S.C. § 1152. 77 I.D. 113 (1970). The Solicitor's Opinion was based on Judge Parker's 1878 mistaken dicta in *Kenyon* [21] and an unsupported conclusion that 18 U.S.C. § 1152 withdraws all general criminal jurisdiction from the tribes. That Opinion was officially withdrawn in 1974 and, therefore, no longer represents the Department's position. *Oliphant* v. *Schlie,* 544 F.2d 1007, 1011 n. 5 (9th Cir. 1976).

Tribal courts exist today as manifestations of the original inherent powers of self-government of all Indian tribes. *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). While tribal judicial authority historically has deteriorated from time to time in accord with the vascillation of federal policy toward the Indian, Indian judicial systems survive and are encouraged today under congressional and executive authorization and approval. No event of history nor any act of Congress abolished generally the original right of

[21] See pp. 12-14, *supra*.

the tribes to impose their law upon all persons within their territory without regard to race. The uncertainties of tribal authority that have existed arose from the pragmatism of war and political power of a bygone age, not in the laws of this country.

III. TRIBAL EXERCISE OF CRIMINAL JURISDICTION OVER NON-INDIANS FOR ON-RESERVATION VIOLATIONS OF TRIBAL LAW IS NECESSARY TO THE PRESERVATION OF RESERVATION ORDER AND FURTHERS THE PREVAILING FEDERAL POLICY OF DEVELOPING STRONG TRIBAL GOVERNMENTS.

A. Petitioners' and *Amici's* Arguments Based on the Size and Capacity of the Suquamish Tribe Ignore the Complexity of Indian Country and the Broad Applicability of the Ruling They Seek.

Amicus South Dakota characterizes the decision in *Oliphant* as representative of the "fast pace of change in Federal Indian policy" and of a threatened breach of status quo. Their alliance of Attorneys General suggest that the Suquamish exercise of jurisdiction is something radically new, an isolated event that portends disruption of an age-old balance. This is an inaccurate portrayal of the present situation.

Petitioners and *amici,* especially Kitsap County, would cast further doubt upon the validity of the Suquamish Tribe's law enforcement by referring to the size of the tribe, 50-173 members, its percentage of the total Port Madison population, 1.7 to 5.8 percent, and the large non-Indian land base, about 63 percent. Brief for Attorney General of Washington at 2-3; Brief for Petitioners at 8-9. Washington's Attorney General gratuitously and inaccurately asserts that Port Madison is reasonably typical of the reservations in

that state. Brief at 2. Between these parties they conclude the Suquamish have not had a tribal community at Port Madison for some time. Brief for Petitioners at 9. Kitsap County believes the Suquamish Court to be suspect, citing lack of experience with various types of proceedings, standards for judicial and jury qualification, lack of facilities and the like. Brief for Kitsap County at 18-19.

These opponents of the Suquamish would have the Court decide the broad issue of tribal jurisdiction over non-Indians in a vacuum of understanding of the true nature of Indian country. The incongruities between the legal issues presented and the factual context will be apparent to the Court. While other tribes of the size and land wealth of the Suquamish do exist it is not possible to regard Suquamish as typical of all tribes or tribal courts. The complexity and variety of tribal circumstance in matters such as reservation land base cannot be overstated.

Within the State of Washington alone there are five reservations with significantly larger land areas than Port Madison. See Appendix A to this Brief. Colville, for example, is over one million acres and is 92.7 percent tribally owned with a 63 percent Indian population. *Id.* at 5a. Many of the Washington reservations are primarily allotted, but allotted land cannot be presumed to be non-Indian. Quinault, for instance, is almost 98 percent allotted but its non-Indian population is only about 20.8 percent. *Id.* The Arizona reservations will be equally affected by the Court's decision. Many of those reservations are wholly owned by the tribes or else are relatively unallotted. Typically, the non-Indian populations of those reservations is low,

from about 3 to 10 percent. *Id.* at 1a. In some cases large non-Indian populations live within reservations that are almost totally owned by the tribes (*e.g.*, Colorado River). *Id.* South Dakota presents intermediate situations with tribal land holdings ranging from 100 to 75 percent at one end of the scale to one or two percent at the other; the total non-Indian, on-reservation population would be about 59.2 percent.

To the extent Petitioners and *amici* suppose that Port Madison is a non-Indian community and that that conclusion, if true, should have legal weight, they are misdirected. In essence, they argue a *de facto* termination of the tribe and diminishment of the reservation. Their facts and conclusions, however, are not found upon the record. And this Court, in any event, has made clear that reservation boundaries and legal status remain intact unless clearly dismantled by Congress. *Rosebud Sioux Tribe* v. *Kneip*, —— U.S. ——, 97 S. Ct. 1361, 1363 (1977). Moreover, 28 U.S.C. section 1151 establishes that Indian country includes fee patented lands within the reservation.

B. Tribal Courts Are Exercising Jurisdiction Over Non-Indians To A Reasonable Extent Dictated By The Need to Maintain Orderly, Safe Reservations.

Today approximately 127 [22] reservation court systems operate in the United States exercising jurisdic-

[22] This total was compiled by NTCA counsel from the following sources: National American Indian Court Judges Association, Operational Reservation Indian Court Services (as of 3-18-77) (hereinafter cited as Operational Court Services); SURVEY OF TRIBAL COURTS p. 27 *supra*; Letter from Hans Walker, Assistant Solicitor, Division of Indian Affairs, Department of the Interior to H. Bartow Farr, Assistant to the Solicitor General, May 20, 1977 (hereinafter cited as Walker Letter).

tion in criminal, civil, and conservation cases. This figure reflects growth of over 49 percent since 1973. AIPRC, FINAL REPORT 163. Of the current total, 71 are tribal courts, established and functioning pursuant to tribal legislative powers with written codes; 30 exist and operate under the Code of Federal Regulations, 25 C.F.R. part 11 (1976); 16 are traditional courts of the New Mexico pueblos; and ten are solely conservation courts. *See* Operational Court Services, *supra*. Our immediate concern is with the 71 tribal courts, most of which are created under the authority of the Indian Reorganization Act. 25 U.S.C. § 476 (1970).

In 1973, Indian tribal courts handled approximately 70,000 cases [23] and the caseload has grown markedly since, to an estimated minimum 85,000 in 1975.[24] Well over 70 percent of the total court caseload for most tribes consists of criminal matters, primarily misdemeanors such as simple assault, disorderly conduct, and public intoxication, with the balance of criminal matters composed chiefly of traffic and juvenile offenses.[25] SURVEY OF TRIBAL COURTS 47.

Crime constitutes a problem throughout much of Indian country. The BIA has reported that in 1975 there were 94,424 criminal offenses in Indian country reflecting a crime rate 4.5 percent greater than for rural America. DIV. LAW ENFORCEMENT SERVICES, BUREAU OF INDIAN AFFAIRS, THE COMBINED TRIBAL AND

[23] AIPRC, FINAL REPORT 163-64.

[24] Counsel's tabulation based on the figures reported in SURVEY OF TRIBAL COURTS.

[25] This figure based on both adult and juvenile offenses.

BUREAU OF LAW ENFORCEMENT SERVICES: ANNUAL REPORT 28, 43 (1975). The rate for violent crime, however, was nearly 520 percent greater and increasing. *Id.* at 28. The overall increase in the crime rate was 16.6 percent over 1970. *Id.* at 29.

Non-Indians increasingly are a part of this problem. As noted above, many Indian reservations, particularly those in the Pacific Northwest and the Great Plains states have substantial non-Indian populations, *see* Appendix A, owing principally to past federal policies of opening Indian lands to non-Indian settlement. In contrast, the reservations of the Southwest typically have non-Indian populations of near-zero to about 10 percent.[26] The huge Navajo reservation, for example, with a total population of nearly 133,000 is only about 5.5 percent non-Indian. *See* Appendix A. Such figures, of course, do not account for significant transitory non-Indian populations. The nature and extent of non-Indian reservation crime thus varies widely throughout the country.

Bureau of Indian Affairs arrest data compiled for the first half of this year show that nearly 300 non-Indians have been arrested by tribal and/or BIA authorities on reservations throughout the country for a wide range of non-traffic criminal offenses.[27] This number represents about 2.1 percent of total arrests. *Id.* On many reservations, however, traffic offenses bring significant numbers of non-Indians before the tribal courts.

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[26] Population figures are based on 1976 BIA estimates.

[27] BUREAU OF INDIAN AFFAIRS, TRIBAL AND BUREAU OF LAW ENFORCEMENT SERVICES AUTOMATED DATA REPORT, JAN. 1, 1977 TO JUNE 30, 1977. This total excludes 28 reservations which did not report and includes both adult and juvenile arrests.

The high incidence of reservation crime is not being addressed by state and federal authorities. Recent studies indicate that with regard to major crimes, U.S. attorneys declined to prosecute 80 percent of the cases presented to them. AIPRC, FINAL REPORT 196. A 1975 Justice Department Task Force reported that, while they could find no systematic discrimination in Indian cases, U.S. Attorneys in fact declined 75 percent of the cases presented to them. U.S. DEP'T OF JUSTICE, REPORT OF THE TASK FORCE ON INDIAN MATTERS 45-46 (1975). Many declinations are in favor of tribal jurisdiction, but there remain serious problems with federal enforcement nevertheless and the persistence of jurisdictional uncertainties contributes heavily to the situation. *Id.* at 16. The Justice Department Task Force found that federal prosecution of Indian offenses is slow and uncertain and success difficult to obtain. *Id.* at 41, 46. Indian cases were described as being minor and ill-suited to the federal court system. *Id.* at 41. Our experience and the Task Force Report support the observations of the Ninth Circuit in *Oliphant* that federal prosecutors are reluctant to proceed against non-Indians for minor offenses in crowded courts, where litigation costs will run high, and where success means imposition of only a small fine or a suspended sentence. 544 F.2d at 1013. Similarly, and notwithstanding the protests of Kitsap County, Brief at 11-17, state and county prosecutors show the same reluctance where their jurisdiction is unclear and where they perceive little stake in the outcome. *Id.* at 1013-14. We concur with the Ninth Circuit that a major factor contributing to the tribal law enforcement problem is the persistence of anti-Indian prejudice in many areas. *Id.* at 1013.

The result of this federal and state reluctance is that non-Indian offenses against tribal and/or federal law go unpunished. The Justice Department Task Force, *supra,* concluded that "federal practices and standards applied in determining declinations in Indian cases have created a serious problem for the overall maintenance of law and order on reservations," *id.* at 49, and recommended development of tribal courts and revision of tribal codes as an important part of the solution, stating:

> A strong, competent tribal court system is an essential element in attaining effective reservation law enforcement. While federal performance in the prosecution of crimes in Indian country must be improved, the effects would not be significant absent a great emphasis on improvements in tribal court systems.

Id. at 58; *see id.* at 50.

In *Oliphant*, the Court of Appeals made clear that in the absence of Suquamish tribal police there would have been no law enforcement on the reservation. 544 F.2d at 1013. It is in response to the frequency and gravity of such jurisdictional and enforcement vacuums that Indian tribes, like the Suquamish, have acted in recent years to revise their law and order codes and to extend their jurisdiction to all persons within their reservations.

The Suquamish law revision is part of a larger, continuing trend among Indian tribes generated by the requirements of the Indian Civil Rights Act, increased jurisdictional conflicts among federal, state, and tribal authorities, particularly on allotted reservations, the high incidence of reservation crime, and the growing

capacity and determination of tribes to deal with their own criminal and civil problems. *See* SURVEY OF TRIBAL COURTS, *supra* p. 27, at 88.

Of the 98 tribes surveyed in 1976 by the American Indian Lawyer Training Program (AILTP), 43 said they desired revision of their constitutions and 15 were actually engaged in the revision process; 33 tribes were then revising their codes, while 37 expressed a need for code revision. *Id.* at 90. The tribal movement toward constitutional amendment and code revision has for many tribes included repeal of prohibitions against exercise of jurisdiction over non-Indians that originated in the early IRA years. The AILTP Survey identified 33 tribes exercising some measure of jurisdiction over non-Indians.[38] SURVEY OF TRIBAL COURTS, App. D. Others were in the process of effectuating the necessary internal changes to do so. *Id.* at 48. In addition, a BIA survey indicates that another 12 tribes have enacted ordinances permitting the assumption of jurisdiction over non-Indians, Walker Letter, *supra* note 22, making a total of 45 tribes possessing the potential for assertion of such authority. The trend toward tribal exercise of jurisdiction over non-Indians is a phenomenon born of practical necessity.

The experience of the Gila River Indian Community adjoining Scottsdale, Arizona is fairly indicative of the dimension of the problem and the rationale of the tribal response.[39] Gila River had a history of problems

[38] This figure does not include those tribes which exercise jurisdiction over non-member Indians but not over non-Indians or which exercise limited jurisdiction over non-Indians based on the individual's actual consent.

[39] Reported in NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, 4 JUSTICE AND THE AMERICAN INDIAN 52 (1974).

with violations of their law by outsiders. A cross-deputization agreement between county and tribal police had met with success, but, with election of a new county sheriff, the agreement was not renewed. Without county cooperation, the tribe was rendered virtually powerless to deal with non-Indian offenses such as vandalism, dumping, malicious mischief, and traffic violations. In 1972, the tribal council responded by enacting the first tribal implied consent ordinance in the nation. It provided that the tribal court thereafter would have jurisdiction over all offenses committed by any person within the reservation boundaries and, further, that all persons entering the reservation, adequate notice having been posted, would be deemed to have consented by implication to the jurisdiction of the tribal court.

The result nationally, we submit, has been a reasonable, proportionate, slowly growing, important application of tribal law to non-Indians. Complete information concerning the extent to which Indian tribes are asserting jurisdiction over non-Indians is not available, but it is apparent that Petitioners' cases are not unique. The AILTP Survey of Tribal Courts was able to compile a full breakdown of the caseloads of only eleven of the tribes exercising jurisdiction over non-Indians. These tribes handled a total of 12,791 cases in 1975 and 535 of them (4.2 percent) involved non-Indians. By far the majority (98.9 percent) of such non-Indian cases were criminal misdemeanors, traffic violations, or hunting and fishing violations. *See generally* SURVEY OF TRIBAL COURTS, App. D. See Table I.

TABLE I [30]

Reservation	Caseload				Cases Involving Non-Indians			
	Total	Crim.	Civ.	Other	Total	Crim.	Civ.	Other
Metlakatla	250	248	2	—	c. 12	12	—	—
Hopi	804	—	—	—	8	8	—	—
Gila River	1927	779	438	810	173	25	6	142
Ak Chin	220	200	20	—	20	20	—	—
White Mtn. Apache	3652	2821	66	765	156	1	—	155
Colorado River	2400	1500	900	—	100	100	—	—
Southern Ute	250	213	37	—	2	2	—	—
Fort Hall	1580	1468	10	—	15	15	—	—
Sisseton-Wahpeton	1065	896	365	—	5	5	—	—
Quinault	348	296	52	—	42	42	—	—
Lummi	295	245	5	—	2	2	—	—
	12,791	8,666	1,895	1,575	535	232	6	297

These eleven tribes have a total on-reservation population of 55,129, of whom 57.9 percent are Indian and 42.1 percent are non-Indian.[31] Another three tribes (San Juan Pueblo, Rosebud Sioux, and Port Gamble) reported a total of 69 cases in 1975 involving non-Indians but did not report their tribal court caseloads.

Table II shows the caseloads of those tribes which reportedly exercise jurisdiction over non-Indians but which did not report the number of cases involving non-Indians.

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[30] Column totals do not necessarily reconcile since tribes compile their statistics differently. Some includes traffic offenses in the criminal category.

[31] Based on 1976 BIA estimates.

TABLE II

Reservation	Caseload Crim.	Civ.	Other	Total
Papago	2372	238	—	2610
Hualapai	475	20	5	500
Salt River	571	170	—	741
Bay Mills	5	5	—	10
Cheyenne	c. 2720	—	—	3400
Blackfeet	c. 4900	—	—	7000
Crow Creek	c. 1100	80	—	1184
Cheyenne River	c. 1960	—	—	2940
Uintah-Ouray	c. 1400	—	—	1500
Swinomish	—	—	—	16
Colville	153	—	—	208
Nisqually	—	—	50	50
Suquamish	2	—	—	2
TOTAL	15,658	513	55	20,161

Counsel for NTCA have made their own survey to indicate the level of recent tribal judicial activity involving non-Indians. The results (annualized for comparative purposes) are compiled in Table III:

TABLE III

		Criminal			Civil		
	Total	Total	Non-Indian	% Non-Indian	Total	Non-Indian	% Non-Indian
Ak Chin	91	65	6	9.2	25	4	16.4
Bay Mills	46	36	22	61.1	5	0	0
Cheyenne River	1,999	1,480	30	2.0	519	37	7.1
Colorado River	1,711	1,583	916	57.9	128	54	42.2
Crow Creek	1,135	866	0	0	81	0	0
Makah	236	226	30	13.3	10	0	0
Quinault	206	182	37	20.3	24	4	16.7
San Juan	c. 630	N.A.	183	—	N.A.	6	—
Sisseton	614	447	12	2.7	158	0	0

The available information shows Indian tribes to be exercising jurisdiction over non-Indians to a significant but reasonable extent and largely without challenge to their jurisdiction. The goal of the majority of tribes is to continue to secure the safety of their people and reservations through cooperative, harmonious relationships with neighboring communities and law enforcement agencies, exercising jurisdiction over non-Indians as necessary to accomplish that purpose.

Tribal courts vary widely in their capacity, range of experience and sophistication. Kitsap County would dismiss the Suquamish court out of hand for its lack of experience and low volume of business. Brief at 18-20. The record in *Belgarde* contains a number of speculative allusions to denial of due process based on criteria such as courtroom size, judicial experience, jury composition, lack of a published code and the like. *See* Brief for Petitioners at 17-18.[32] Again, some perspective appropriate to the issue is sorely needed.

The Navajo Tribal Court presided over by three judges and with courts at three locations is a full-time court which handled some 30,000 cases, 80-100 appeals, and 20-30 jury trials in 1974.[33] SURVEY OF TRIBAL COURTS, *supra* p. 27, at D-58-59. *See also* Fahey, *Native American Justice: The Court of the Navajo Nation,* 59 JUDICATURE 10 (1975). The court maintains separate juvenile and appellate processes. SURVEY OF

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[32] The District Court found Oliphant so far had been afforded his rights to due process and equal protection of the laws. Mem. Op. (W.D. Wash. Apr. 5, 1974); J. App. 51-52.

[33] The Navajo Tribe just recently has begun exercising jurisdiction over non-Indian tribal employees for traffic violations. Arizona Republic (Aug. 19, 1977).

TRIBAL COURTS, D-58. Navajo judges possess life tenure. *Id.* Their requisite qualifications are specified in the tribal code and include knowledge and familiarity with the law in addition to awareness of Navajo custom and culture. *Id.* at D-59. Court facilities include courtrooms, judges' chambers, jury rooms, law libraries, and detention space. *Id.* Professional attorneys practice before the court, and the court has access to legal counsel. *Id.* at D-60. The tribe has entered into agreements with the state, surrounding counties, and other tribes concerning the mutual recognition of court judgments. *Id.* at D-59.

Other tribes to not have the population or resources to support the scale of operations at Navajo but nevertheless maintain sound judicial institutions. A profile of the Gila River court reads much like that of Navajo. *See id.* at D-18. In addition, the tribe has a licensing committee for regulation of practice before the tribal court and cross-deputization and extradition agreements with the county. *Id.* at D-20-21. Appeals are heard by 3-judge panels with visiting judges sitting by designation. *Id.* at D-21.

Overall, the AILTP study shows that of the 100 tribes surveyed, the majority have written codes, full-time judges, and some form of appellate procedure. *See generally id.*, App. C. Forty-one percent of the chief judges have at least some college education, and 16 percent have law degrees. *Id.* at C-15. Sixty-eight percent of these tribes have caseloads in excess of 100 per year and, while jury trials are not frequent, 37 percent of the tribes reported having conducted such proceedings during the year. *Id.* at C-10. Sixty-five percent of the tribes operate on annual budgets of over

$15,000 and 69 percent receive financial support from the BIA, the LEAA, or both. *Id.* at C-10-11.

C. Tribal Assertion of Jurisdiction Over Non-Indians Furthers the Federal Policy of Self-Determination and the Development of Strong Tribal Government.

The American Indian Policy Review Commission concluded that tribal courts are "evolving institutions responding to tribal and community needs and operating at various levels of sophistication." AIPRC, FINAL REPORT 164. Their evolution and the considered extension of jurisdiction by the tribes to all persons within their reservations manifestly are consistent with and vital to the federal policy of recognizing inherent tribal sovereignty and of developing the tribal capacity for self-government.

Since enactment of the Indian Reorganization Act in 1934 it has been the prevailing, albeit uneven, policy of the federal government to strengthen Indian tribal government both politically and economically. *Morton* v. *Mancari,* 417 U.S. 535, 542-43 (1974). The IRA, in reversing decades of destructive policy, provided, *inter alia,* for tribal constitutional organization, including incorporation of all powers vested under existing law (plus others expressly conferred), 25 U.S.C. § 476, and a halt to erosion of the Indian land base; 25 U.S.C. §§ 461, 462, 467. Congress relapsed into assimilationist tendencies in the early 1950's with the passage of House Concurrent Resolution 108, 67 Stat. B132 (1953), and the outright termination of several tribes.[34] Beginning in about 1968, and continuing into the present, Congress and the administration have

[34] *E.g.* Act of June 17, 1954, 68 Stat. 250 (Menominee); 25 U.S.C. § 564 *et seq.* (1970) (Klamath).

generally repudiated such policies. *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L.Rev. 535 (1975).

Congress acted in 1968 to require tribal consent to any further grant of criminal or civil jurisdiction to the states under the provisions of Pub. L. 83-280. 25 U.S.C. § 1326 (1970).[35] In 1970, President Nixon proclaimed a new policy, calling for self-determination and self-realization for Indian people, 116 Cong. Rec. 23,131 (1970), and subsequent legislation has been directed to the same end.[36] The Menominees, terminated in earlier years, were restored in 1973 to federal recognition with full reinstatement of their pre-termination treaty and statutory rights. 25 U.S.C. § 903 *et seq.* (Supp. V, 1975). The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* (Supp. V, 1975), broadly authorized federal contracting with tribes pursuant to a declared policy of establishing meaningful self-determination. This Act specifically provides for contracts or grants for the strengthening or improvement of tribal government. *Id.* § 450h(a)(1).[37] Earlier this year, the congressional American Indian Policy Review Commission [38] recommended that "[t]he long-term objective of Federal-Indian policy be the development of tribal governments into fully operational governments exercising

[35] *See also* President Johnson's Message to Congress, Mar. 6, 1968, 114 Cong. Rec. 5394 (1968).

[36] *See also* S. Con. Res. 26, 92d Cong., 1st Sess. (1971).

[37] *See also* Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (Supp. V, 1975).

[38] *See* Pub. L. 93-580, 88 Stat. 1910 (1975).

the same powers and shouldering the same responsibilities as other local governments." AIPRC, Final Report 154.

The direction of federal policy toward creation of strong, capable tribal self-government is undeniable and has been acknowledged by this Court. *Bryan* v. *Itasca County,* 426 U.S. 373, 388-89, n. 14 (1976). *See also Santa Rosa Band of Indians* v. *Kings County,* 532 F.2d 655, 663 (9th Cir. 1975). The federal self-determination effort necessarily and in fact has included support for the development of tribal courts and assertion of tribal jurisdiction.

As noted above, Congress has authorized and appropriated funds for Indian courts continuously since 1888.[39] Recently, federal funding for tribal justice systems has increased dramatically. The 1974 BIA budget for law enforcement was $8.3 million. Bureau of Indian Affairs, Indian Law Enforcement History 76 (1975). In the 12-month period ending June 30, 1976, however, the BIA, through contract and direct services, spent $24 million for tribal justice systems and the Law Enforcement Assistance Administration of the Department of Justice (LEAA), awarded another $4.69 million in grants to tribes, with an added $900,000 to law enforcement agencies in areas with substantial Indian populations. AIPRC, Final Report 166. The 1977 BIA budget included $3.0 million specifically for tribal judicial services.

More basically, the Department of the Interior has encouraged and formally approved tribal initiatives to extend their jurisdiction territorially to all persons.

[39] See p. 25, *supra*; 25 U.S.C. § 13 (1970).

The trend of the IRA tribes to amend their constitutions to permit jurisdiction over non-Indians has been possible only with formal secretarial approval of such amendments.[40] 25 U.S.C. § 476 (1970). In addition, where the tribal constitution so requires, the Secretary has approved the tribal law and order codes by which this jurisdiction has been effectuated.

Clearly the concept of strong self-government includes the capacity of the tribes to ordain their own justice systems and to adjudicate their grievances through self-established tribal courts. *Tom* v. *Sutton,* 533 F.2d 1101, 1103 (9th Cir. 1976); *Settler* v. *Lameer,* 507 F.2d 231, 238 (9th Cir. 1974); *O'Neal* v. *Cheyenne River Sioux Tribe,* 482 F.2d 1140, 1144-45 (8th Cir. 1973). Thus the Suquamish Tribe in 1973, exercising its inherent powers, enacted a jurisdictional ordinance pursuant to a federally-approved constitution and, consequently, implemented an overriding federal policy of engendering strong tribal government. *See Fisher* v. *District Court,* 424 U.S. 382 (1976).

We submit that prevailing federal policy supports the jurisdiction challenged in this case. To permit the state of Washington to extend its jurisdiction to the reservation as various of Petitioners' theories contemplate plainly would undermine the authority of tribal courts over reservation affairs and thus "interfere with the powers of self-government conferred upon the [tribe] and exercised through the tribal court." *Fisher* v. *District Court,* 424 U.S. 382 (1976); *Williams* v. *Lee,* 358 U.S. 217, 223 (1959). This Court has disavowed such usurpation of power consistently. Nevertheless, under the circumstances of this case and those extant throughout much of Indian country, the same interference with self-government and self-determination and the same corresponding incongruence with federal policy must be found if federal jurisdiction *over non-Indians* is to be held to be exclusive and tribal jurisdiction is, therefore, found lacking. A determination that the tribes generally do not possess concurrent jurisdiction with the federal government over non-Indians for minor criminal offenses would mean, as a practical matter, that tribal law is to a significant degree unenforceable and, therefore, of no consequence. The ability of tribes across the country to protect their citizens through their own legal process would be stunted, if not denied. The tribal legislative power, the dignity and the well-being of the tribe would thus be divested in incalculable measure. The history of Federal-Indian relations contradicts such a result, as would the attendant frustration of clear, established policy.

[40] Since 1970 at least 18 tribes have received formal approval of constitutional amendments permitting them to exercise jurisdiction over non-Indians. Telephone Interview with Pat Simmons, B1A, Tribal Government Services, Sept. 26, 1977.

D. Assertion of Jurisdiction Over Non-Indians Serves Legitimate Tribal Goals of Preserving Reservation Order and Protecting Indian People Through Governmental Administration of Due Process of Law.

If the federal promise of self-government is to be meaningful, Indian tribes must be able to make their own laws and thereby protect themselves and their citizens against all who would infringe the peace of the reservation. This right inheres in any legitimate government. It is indulging unreality to believe this will be accomplished by restricting tribal jurisdiction

to Indians. Indian people long have suffered the depredations of "unprincipled white men" on their reservations without effective recourse, owing to the failures and uncertainties of state and federal law enforcement. It has been but recently that the age-old doctrine of inherent tribal authority has coalesced with federal law and policy to create the potential for real self-government and restoration of the dignity of Indian people within the federal system. *See* Note, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH.L.REV. 955, 956 (1972). This case thus bears heavily upon the course of the tribal future.

We submit that the *Oliphant* case presents no real departure with the past nor infringement of notions of fundamental fairness or due process of law unless it is presumed the tribes are inherently unjust. There is no support for such a conclusion. If it is found in this or future cases that an individual tribe's assertion of jurisdiction over any person under specific circumstances constitutes a denial of due process, remedies exist under the provisions of the Indian Civil Rights Act. 25 U.S.C. § 1301 *et seq.* (1970). Generally speaking, resolution of the issue at hand lies in determining the essential fairness of particular situations rather than in sweeping aside tribal jurisdiction over non-Indians on principle.

Indian tribes long have been recognized to possess the power to exclude undesirable persons from their reservations, *Morris* v. *Hitchcock,* 194 U.S. 384 (1904); *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976), yet this is a deprivation of liberty arguably more serious under many circumstances than the small fines or jail terms commonly imposed in tribal misdemeanor cases. From the exclusionary

power and the related notion of privilege derive the concept of implied consent by which the Suquamish and numerous other tribes have asserted jurisdiction over non-Indians. This Court held in *Hess* v. *Pawloski,* 274 U.S. 352 (1927), that the states afford due process when they subject nonresidents to the state's law on the basis of an individual's consent implied in his enjoyment of a state privilege such as driving on the state's highway.

South Dakota argues at pages 3-4 of its brief that analogies to transients passing through states or counties where they do not reside are unfair under circumstances where petitioners are permanent residents of the reservation and have not left their original sovereigns. The State does not, however, argue for preservation of jurisdiction where the analogy clearly *is* fair, and this Court should not sweep aside the tribe's power to deal with such situations. Where the non-Indian is a reservation resident the situation presents differences. But it is not credible to argue that historically non-Indian interests were established on the reservation without some grant of privilege of settlement to the non-Indian or without notice of the special legal status of the reservation. Historically, the concept of non-Indian consent to jurisdiction is valid.

Moreover, we believe it is profoundly more sound to determine reservation jurisdiction over criminal offenders territorially rather than racially. To do otherwise is to diminish the political character of the tribes and to define them instead as racial aggregations, a view this Court definitively rejected only last term. *United States* v. *Antelope,* —— U.S. ——, 97 S. Ct. 1395 (1977).

We emphasize that this case deals with the *concurrent* jurisdiction of the tribe with either the federal or state government. The lower courts found that the Suquamish subjected petitioners to its jurisdiction in the actual absence of other authority. We do not understand the parties to deny that the United States (or perhaps the State by virtue of Public Law 280) possessed jurisdiction over the subject matter of the alleged offense and that it could have prosecuted petitioners. But it did not. Thus, the question is one of the tribe possessing the power to enforce its law to secure reservation order, to protect a tribal officer and citizens in situations of practical necessity. This is a manifestly reasonable act of any legitimate government.

The available information concerning actual tribal assertion of jurisdiction over non-Indians shows that the power has been invoked moderately and reasonably, though frequently enough to require its preservation. It is a practical response to the necessity of preserving a safe, peaceful home for tribal members.

Those who contend, as does South Dakota, Brief at 4-5, 27-29, that exercise of criminal jurisdiction over non-Indians is not essential to tribal self-government ignore the nature of government and the purpose of law as we know it. Indian tribes seek to prevent the violation of their law, thereby protecting their citizenry as well as their governmental legitimacy so that the reservation will be habitable and their governments stable and progressive. If assertion of jurisdiction over non-Indians fulfills those purposes, then it is crucial to self-government and properly aligned with federal policy.

CONCLUSION

We respectfully pray that the decisions below be affirmed because residual Indian sovereignty never has been terminated.

Nevertheless, we recognize that in our analysis of the broadly-framed issue of whether Indian tribes, under any circumstances, can exercise jurisdiction over non-Indians we necessarily have had to travel outside the record. *Amici* supporting petitioners have ranged further afield in creating their broad issue and in describing the jurisdictional situation in the various states, the social and demographic characteristics of Kitsap County, and the attributes of the Suquamish tribe and its court. Should this record supplementation lead the Court to question the adequacy of the existing record, we respectfully suggest that the writ of certiorari could properly be dismissed as improvidently granted. *Gilbert* v. *California,* 388 U.S. 263, 269 (1967); *Mitchell* v. *Oregon Frozen Foods Co.,* 361 U.S. 231 (1960).

Respectfully submitted,

GEORGE B. CHRISTENSEN
Suite 5000
One First National Plaza
Chicago, Illinois 60603

JOSEPH S. FONTANA
JOHN R. KEYS, JR.
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Counsel for Amicus Curiae

Of Counsel:

WINSTON & STRAWN
Suite 1040
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Suite 5000
One First National Plaza
Chicago, Illinois 60603

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APPENDIX

APPENDIX A [1a]

Reservation	LAND BASE (acres) [2a] Tribally Owned	Land [4a] Alloted/or Non-Indian	Total [5a]	% Allotted/or Non-Indian	POPULATION [3a] Indian	Non-Indian	Total	% Non-Indian
Alaska								
Annette Island	86,741	0	86,741	0	1,042	500	1,542	32.4
Arizona								
Ak Chin	21,840	0	21,840	0	312	20	332	6.0
Camp Verde	560	80	640	12.5	280	30	310	9.7
Cocopah	528	0	528	0	360	10	370	2.7
Colorado River	258,134	5,958	264,092	2.3	1,673	3,672	5,345	68.7
Fort Apache	1,664,872	0	1,664,872	0	8,077	1,355	9,432	14.4
Fort McDowell	24,680	0	24,680	0	330	2	332	.6
Gila River	274,462	97,467	371,929	26.2	6,405	264	6,669	4.0
Havasupai	3,058	0	3,058	0	308	17	325	5.2
Hopi	2,472,254	0	2,472,254	0	5,673	214	5,887	3.6
Hualapai	991,680	0	992,463	0	703	80	783	10.2
Kaibab	120,413	0	120,413	0	122	37	159	23.3
Navajo	12,940,191	722,854	13,989,222	7.5	125,520	7,355	132,875	5.5
Papago	2,814,871	41,003	2,855,874	1.4	8,707	303	9,010	3.4
Salt River	24,859	24,435	49,294	49.6	2,809	84	2,893	2.9
San Carlos	1,853,841	960	1,877,216	.1	5,619	382	6,001	6.4
Yavapai	1,399	160	1,559	10.3	50	N.A.	50	0
Fort Mojave	*41,884	0	41,884	0	374	850	1,224	69.4

Reservation	Land Alloted/or Non-Indian			% Allotted/or Non-Indian				
	Tribal		Total		Indian	Non-Indian	Total	% Non-Indian
Colorado								
Southern Ute	301,867	4,966	307,110	1.6	792	3,334	4,126	80.8
Ute Mountain	586,288	9,459	595,787	1.6	1,299	77	1,376	5.6
Idaho								
Coeur D'Alene	16,236	53,063	69,299	76.6	450	2,742	3,192	85.9
Fort Hall	224,006	257,666	524,014	49.2	2,258	1,342	3,600	37.3
Michigan								
Bay Mills	•2,189	0	2,189	0	304	60	364	16.5
Hannahville	•3,411	0	3,408	100.0	NA	NA	NA	—
Isabella	506	678	1,184	57.3	NA	NA	NA	—
Keweenaw Bay	1,610	8,124	13,750	59.1	758	6,000	6,758	88.8
Minnesota								
Leech Lake	14,069	12,693	26,766	47.4	2,014	4,885	•6,899	70.8
Nett Lake	30,035	75,244	105,284	71.5	650	22	672	3.3
Mississippi								
Choctaw	17,381	209	17,819	1.2	1,612	125	1,737	7.2
Montana								
Blackfeet	119,806	819,604	950,643	86.3	5,676	1.676	7,352	22.8
Crow	344,305	1,209,949	1,554,254	77.8	4,269	2,469	6,738	36.6
Flathead	562,277	680,674	1,243,968	54.7	2,910	12,831	15,741	81.5
Fort Belknap	162,933	453,115	616,048	73.6	1,603	246	1,849	13.3
Fort Peck	233,153	645,114	964,865	66.9	3,812	6,461	10,273	62.9
Northern Cheyenne	262,296	171,298	433,594	39.5	2,959	443	3,402	13.0
Rocky Boy's	107,613	0	107,613	0	1,528	51	1,579	3.2
Nebraska								
Omaha	11,553	18,860	39,413	47.9	1,362	2,293	3,655	62.7
Nevada								
Battle Mountain	688	0	688	0	NA	NA	NA	—
Carson	160	0	160	0	NA	NA	NA	—
Dresslerville	40	0	40	0	NA	NA	NA	—
Duck Valley	289,819	0	293,674	0	1,007	119	1,126	10.6
Duckwater	3,785	0	3,785	0	NA	NA	NA	—
Elko	193	0	193	0	NA	NA	NA	—
Fallon	900	4,640	5,540	83.8	NA	NA	NA	—
Fort McDermitt	16,396	18,414	34,810	52.9	407	NA	NA	—
Lovelock	20	0	20	0	117	NA	NA	—
Moapa	1,174	0	1,174	0	NA	NA	NA	—
Pyramid Lake	475,085	0	475,085	0	•400	•201	•601	33.4
Reno-Sparks	28	0	28	0	NA	NA	NA	—
South Fork/Odgers	15,037	0	15,037	0	NA	NA	NA	—
Summit Lake	10,289	765	11,054	6.9	NA	NA	NA	—
Walker River	316,670	8,752	323,386	2.7	452	140	592	23.6
Winnemucca	340	0	340	0	NA	NA	NA	—
Yerington	1,166	0	1,166	0	NA	NA	NA	—
Yomba	4,718	0	4,718	0	NA	NA	NA	—
New Mexico								
Acoma Pueblo	245,346	326	245,672	0.1	2,129	26	2,155	1.2
Cochiti Pueblo	28,776	0	28,779	0	544	245	789	31.1
Isleta Pueblo	210,937	11	210,948	0.0	2,255	68	2,373	2.9
Jemez Pueblo	88,860	0	88,867	0	1,756	195	1,951	10.1
Jicarilla	742,315	0	742,315	0	1,976	494	2,470	20.0

Reservation	Tribal	Land Allotted/or Non-Indian	Total	% Allotted/or Non-Indian	Indian	Non-Indian	Total	% Non-Indian
Laguna Pueblo	412,211	41,226	454,454	9.1	3,258	199	3,457	5.8
Mescalero	460,384	0	460,384	0	2,253	257	2,510	10.2
Nambe Pueblo	19,073	0	19,075	0	383	666	1,049	63.5
Picuris Pueblo	14,947	0	14,947	0	•90	•1,407	•1,497	94.0
Pojoaque Pueblo	11,599	0	11,599	0	104	•1,230	1,334	92.2
Ramah	85,961	47,633	146,996	32.4	•1,021	•258	•1,279	20.2
Sandia Pueblo	22,884	0	22,884	0	•190	•336	•526	63.9
San Felipe Pueblo	48,853	77	48,930	0.2	1,858	377	2,235	16.9
San Ildefonso	26,192	0	26,192	0	304	686	990	69.3
San Juan Pueblo	12,232	2	12,234	0.0	1,666	3,275	4,941	66.3
Santa Ana Pueblo	42,527	0	42,527	0	421	1	422	0.2
Santa Clara Pueblo	45,744	4	45,748	0.0	1,035	10	1,045	1.0
Santo Domingo Pueblo	69,260	0	69,260	0	•1,719	•106	•1,825	5.8
Taos Pueblo	95,333	0	95,333	0	•1,086	•3,609	•4,695	76.9
Tesuque Pueblo	16,810	3	16,813	0.0	•195	•165	•360	45.8
Zia Pueblo	112,510	0	112,511	0	546	3	549	0.5
Zuni Peublo	405,034	2,213	407,247	0.5	5,975	399	6,374	6.3
North Dakota								
Fort Berthold	45,044	935,262	980,500	95.4	3,051	209	3,260	6.4
Fort Totten	473	240,434	244,507	98.3	•1,511	•1,209	•2,720	44.4
Standing Rock	294,840	542,701	847,799	64.0	•1,850	•1,782	•3,632	49.1
Turtle Mountain	35,579	34,144	70,240	48.6	4,581	347	4,928	7.0
Oregon								
Burns Paiute	0	11,014	11,786	93.4	123	NA	NA	—
Umatilla	15,646	230,153	245,799	93.6	•407	•2,876	•3,283	87.6
Warm Springs	480,196	84,118	564,330	14.9	1,922	185	2,107	8.8
South Dakota								
Cheyenne River	911,467	503,483	1,419,504	35.5	4,487	3,795	8,282	45.8
Crow Creek	31,112	72,339	122,531	59.0	1,432	442	1,874	23.6
Flandreau	2,180	0	2,356	0	•666	•6,956	•7,622	91.3
Lower Brule	74,863	31,872	119,944	26.6	743	145	888	16.3
Pine Ridge	372,243	2,358,236	2,778,710	84.9	9,237	3,941	13,178	29.9
Rosebud	409,321	540,112	978,230	55.2	8,410	16,470	24,880	66.2
Sisseton	877	105,172	106,211	99.0	3,241	11,309	14,550	77.7
Yankton	5,560	429,372	434,932	98.7	1,227	5,705	6,932	82.3
Utah								
Uintah and Ouray	97 ,273	37,855	1,008,152	3.8	1,645	8,329	9,974	83.5
Washington								
Colville	937,240	74,255	1,011,495	7.3	2,560	1,495	4,055	36.9
Hoh	443	0	443	0	73	NA	NA	—
Kalispel	409	4,220	4,629	91.2	123	20	143	14.0
Lower Elwha	372	0	372	0	114	NA	NA	—
Lummi	247	7,073	7,320	96.6	1,305	905	2,210	41.0
Makah	24,526	2,487	27,013	9.2	920	209	1,129	18.5
Muckleshoot	0	1,188	1,189	99.9	NA	NA	NA	—
Nisqually	3	813	816	99.6	111	150	261	57.5
Port Gamble	1,301	0	1,301	0	263	0	263	0
Port Madison	41	2,638	2,680	98.4	176	3,000	3,176	94.5

Reservation	Tribal	Land Allotted/or Non-Indian	Total	% Allotted/or Non-Indian	Indian	Non-Indian	Total	% Non-Indian
Quileute	584	10	594	1.7	331	NA	NA	—
Quinault	4,414	184,629	189,061	97.7	1,153	303	1,456	20.8
Shoalwater	335	0	335	0	11	NA	NA	—
Skokomish	16	4,971	4,987	99.7	255	69	324	21.3
Spokane	102,441	34,523	137,002	25.2	743	209	952	22.0
Squaxin Island	0	1,494	1,496	99.9	312	NA	NA	—
Swinomish	273	6,790	7,063	96.1	386	403	789	51.1
Tulalip	5,171	3,707	8,878	41.8	502	1,034	1,536	67.3
Yakima	842,978	524,404	1,367,405	38.4	5,210	17,714	22,924	77.3
Wisconsin								
Bad River	8,325	33,477	54,912	61.0	•480	•266	•746	35.7
Lac Courte Oreilles	3,945	26,584	43,719	60.8	•571	•422	•993	42.5
Menominee	—	—	•••233,902	—	2,707	301	3,008	10.0
Wyoming								
Wind River	1,776,136	109,344	1,886,556		4,677	11,938	16,615	71.9

6a

• Signifies unpublished data provided to amicus by BIA based on 1970 census.

•• Signifies data taken from BIA, ANNUAL REPORT OF INDIAN LANDS, *infra* note 2a.

••• Figure obtained from PLANNING SUPPORT GROUP, BIA, MENOMINEE INDIAN TRIBE OF WISCONSIN, 4 (1975).

[1a] Appendix "A" represents land base and population data for those tribes maintaining some form of court system. The tribes of California and Oklahoma are generally excluded on the basis of the jurisdictional status of those states.

[2a] Acreage figures, unless otherwise indicated, are taken from U.S. DEP'T OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS (1974); *Compare* BIA, OFFICE OF TRUST RESPONSIBILITIES, ANNUAL REPORT OF INDIAN LANDS (June 30, 1974).

[3a] Population figures, unless otherwise indicated, are taken from SURVEY OF TRIBAL COURTS, *supra*, App. D which in turn were based on a 1973 BIA update of the 1970 census and, in some cases, a 1976 BIA estimate. *Id.* at D-1. Non-Indian population is based on the 1970 census. *Id.*

7a

[4a] The category Allotted/or Non-Indian reflects a total of two categories. Allotted land may, of course, be owned either by Indians or non-Indians.

[5a] The sum of the acreage of tribal lands and allotted/non-Indian lands may be less than the total where the reservation includes government-owned land.

APPENDIX B

Name of Tribe: _____

Time Period of Information: _____

Total Number of cases handled by tribal Court: _____

Number of Criminal cases: _____
(include traffic, hunting and fishing violations)
Non-Indian defendant in criminal cases: _____
Indian non-member in criminal cases: _____

Number of Civil cases: _____
Non-Indian plaintiff in civil cases: _____
Non-member plaintiff in civil cases: _____
Non-Indian defendant in civil cases: _____
Non-member defendant in civil cases: _____

Does your tribe have an implied consent ordinance?
Yes _____ No _____

Please state the reasons the tribe has found it necessary or advisable to exercise jurisdiction over:

(a) Non-Indians: _____
_____
_____
_____

(b) Non-member Indians: _____
_____
_____
_____

_____
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